

16.9.09

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN IN GEORGE TOWN, GRAND CAYMAN

IND. NO. 43 OF 2009

REGINA

v

GIFFORD PRENDERGAST

RULING delivered by The Honourable Justice Henderson
on September 16, 2009 at George Town, Grand Cayman.

CHARGE: INDECENT ASSAULT

APPEARANCES:

For the CROWN:

MS. K. GUNN

For the DEFENDANT:

MS. K. REID

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1 WEDNESDAY, SEPTEMBER 16, 2009

2

3 RULING

4 **HENDERSON J**

5 The Crown proposes to adduce in evidence
6 some 1200 to 1300 electronic images found in
7 the memory of a laptop which was allegedly in
8 the defendant's possession. The defendant is
9 charged with committing a series of homosexual
10 acts with a young boy, to whom I will refer as
11 "JP" in this ruling, while JP was aged 12 and
12 13. These acts included mutual oral sex and
13 mutual masturbation.

14 One of the several locations where the
15 acts are said to have occurred was at a
16 warehouse where the defendant had established a
17 small living space for himself. The laptop
18 computer was seized from that location.

19 I have viewed a representative sampling of
20 these images. Most are pornographic and
21 homosexual in nature, and a clear majority of
22 them depict adolescent boys in the age range of
23 14 to 20.

24 The defence objects to the admissibility
25 of this evidence on the ground that the

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1 probative value of the evidence, if any, is
2 outweighed by its prejudicial effect.

3 The images in question appear to have been
4 stored in the unallocated memory space of the
5 hard drive while the person using the computer,
6 allegedly the defendant, was viewing these
7 images on the internet.

8 This is an area of the law of evidence
9 which is not free of difficulty. The
10 traditional rule expressed in a general way
11 dates back to the decision in *Makin and The*
12 *Attorney-General for New South Wales* [1894]
13 A.C. 57 (P.C.). Lord Herschell (for the Privy
14 Council) expressed it in this way:

15 "In their Lordships' opinion the
16 principles which must govern the
17 decision of the case are clear,
18 though the application of them
19 is by no means free from
20 difficulty. It is undoubtedly
21 not competent for the
22 prosecution to adduce evidence
23 tending to show that the accused
24 has been guilty of criminal
25 acts, other than those covered

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1 by the indictment, for the
2 purpose of leading to the
3 conclusion that the accused is a
4 person likely from his criminal
5 conduct or character to have
6 committed the offence for which
7 he is being tried. On the other
8 hand, the mere fact that the
9 evidence adduced tends to shew
10 the commission of other crimes
11 does not render it inadmissible
12 if it be relevant to an issue
13 before the jury, and it may be
14 so relevant if it bears upon the
15 question whether the acts
16 alleged to constitute the crime
17 charged in the indictment were
18 designed or accidental, or to
19 rebut a defence which would
20 otherwise be open to the
21 accused. The statement of these
22 general principles is easy, but
23 it is obvious that it may often
24 be very difficult to draw the
25 line and to decide whether a

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1 particular piece of evidence is
2 on the one side or the other."
3

4 The same principle was addressed at length
5 by the House of Lords in *Boardman and Director*
6 of *Public Prosecutions* [1975] A.C. 421, in a
7 case involving the admissibility of similar act
8 evidence.

9 In the years following *Boardman*, the rule,
10 at least as it pertains to similar acts, was
11 generally taken to require proof of a striking
12 similarity between the facts alleged in the
13 indictment and the proffered evidence of
14 previous similar acts. However, the House of
15 Lords re-visited that question in *Director of*
16 *Public Prosecutions v. P.* [1991] 2 A.C. 447.
17 After an exhaustive analysis, their Lordships
18 concluded that the generally held view of the
19 significance of *Boardman* was expressed too
20 broadly. Their Lordships pointed to the
21 variety of phrases found in *Boardman* in the
22 attempt made in that decision to clarify the
23 nature of the test. The phrase "striking
24 similarities" does appear at some points in the
25 judgment, but at others phrases such as "some

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1 feature of similarity" and "underlying unity"
2 were used.
3 In its restatement of the rule in *P.*, the
4 House of Lords said this:
5 "From all that was said by the
6 House in *Reg. v. Boardman I*
7 would deduce the essential
8 feature of evidence which is to
9 be admitted is that its
10 probative force in support of
11 the allegation that an accused
12 person committed a crime is
13 sufficiently great to make it
14 just to admit the evidence,
15 notwithstanding that it is
16 prejudicial to the accused in
17 tending to show that he was
18 guilty of another crime. Such
19 probative force may be derived
20 from striking similarities in
21 the evidence about the manner in
22 which the crime was committed
23 and the authorities provide
24 illustrations of that of which
25 *Reg. v. Straffen [1952] 2 Q.B.*

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1 911 and Rex v. *Smith* (1915) 11
2 Cr.App.R. 229, provide notable
3 examples. But restricting the
4 circumstances in which there is
5 sufficient probative force to
6 overcome prejudice of evidence
7 relating to another crime to
8 cases in which there is some
9 striking similarity between them
10 is to restrict the operation of
11 the principle in a way which
12 gives too much effect to a
13 particular manner of stating it,
14 and is not justified in
15 principle. *Hume on Crimes*,
16 3rd ed. (1844), vol. II, page
17 384, said long ago:
18 'the aptitude and coherence
19 of the several circumstances
20 often as fully confirm the
21 truth of the story, as if all
22 the witnesses were deponing
23 to the same facts.'

24
25 Once the principle is

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1 recognised, that what has to be
2 assessed is the probative force
3 of the evidence in question, the
4 infinite variety of
5 circumstances in which the
6 question arises demonstrates
7 that there is no single manner
8 in which this can be achieved.
9 Whether the evidence has
10 sufficient probative value to
11 outweigh its prejudicial effect
12 must in each case be a question
13 of degree."

14
15 Later, at page 462, their Lordships noted:

16 "To transpose this requirement
17 to other situations where the
18 question is whether a crime has
19 been committed, rather than who
20 did commit it, is to impose an
21 unnecessary and improper
22 restriction upon the application
23 of the principle."

24

25 The result of the decision in *P.* is that

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1 the striking similarity test no longer
2 represents the law and one must, in every case,
3 engage in a different analysis. One must first
4 ask whether the evidence to which objection is
5 taken has relevance at all. If it does not,
6 then the evidence is clearly not admissible.
7 If it has some relevance, a judgment must be
8 made as to its probative value. If it has
9 significant probative value, a judgment of a
10 different sort must be made, namely an
11 assessment of the likely prejudicial effect of
12 admitting the evidence. The degrees of
13 probative value and prejudicial effect must be
14 weighed against each other. It is only where
15 the probative value outweighs the prejudicial
16 effect that the evidence should be admitted.

17 A modern application of these principles
18 in a case with some similarities to the case at
19 bar is found in *R v Campbell* [2005] EWCA Crim
20 248 (C.A., Crim. Div.). It was alleged that
21 Campbell had kidnapped and murdered his 15 year
22 old niece. The evidence was clear that
23 Campbell had taken a considerable interest in
24 the niece. What the prosecution sought to show
25 was that this was an unnatural interest driven

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1 by a sexual passion for her and for adolescent
2 girls of her approximate age. The evidence
3 showed that Campbell collected her frequently
4 from school and took her to his house as much
5 as four times in a week. He kept a diary
6 concerning the girl. He set up her mobile
7 phone in a way which allowed him to exchange
8 text messages with her, which he did. Many of
9 those messages were sent late at night and
10 contained sexual connotations.

11 The evidence to which objection was taken
12 in Campbell's case was evidence that, on the
13 evening before the disappearance of the young
14 girl, Campbell had spent a total of some four
15 and a half hours visiting websites on his
16 computer amassing and downloading images. Six
17 of the downloaded images were very similar to
18 the appearance of his niece. Objection was
19 taken to the admissibility of this evidence (in
20 a jury trial) and to evidence of other internet
21 activity by Campbell involving access to what
22 were described in the judgment as "teenage sex
23 sites". It was argued that the evidence went
24 to propensity and no more.

25 The Crown replied that the evidence went

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1 to a great deal more than propensity because it
2 tended to rebut what was, in effect, a defence
3 by Campbell of innocent association. It also
4 served, in the Crown's submission, to prove an
5 interest in girls around the age of the niece
6 and in particular one who closely resembled
7 her. The inference contended for was that this
8 established the sexual passion possessed by
9 Campbell for his young relative.

10 The trial judge admitted the evidence.

11 The Court of Appeal agreed that it was
12 admissible. After reviewing a number of
13 authorities, the court concluded:

14 "The evidence which the defence
15 sought to exclude in the present
16 case illuminated the
17 relationship between the
18 appellant and Danielle. It
19 helped to establish motive, and
20 it also went in a legitimate way
21 to rebut the appellant's stance
22 when interviewed, namely that
23 his was a normal relationship
24 with his 15 year old niece.

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1 In our judgment the judge was
2 right to rule as he did. The
3 evidence which the appellant
4 sought to exclude was relevant
5 to establish the motive for the
6 offences charged in the
7 indictment, and evidence of
8 motive is always admissible to
9 show that it is more probable
10 than not that the accused
11 committed the offence charged
12 (see *R v Ball* [1911] AC 47 at
13 68).
14
15 It was also admissible because
16 without it the account of the
17 critical relationship between
18 the appellant and Danielle which
19 the jury would have received
20 would have been incomplete and
21 capable of being distorted.
22 Indeed, in the light of the
23 evidence which they heard, the
24 jury may well have concluded
25 that the appellant did begin

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1 that process of distortion when
2 he was interviewed. Of course
3 the evidence was prejudicial,
4 but for the reasons we have
5 outlined it was highly
6 probative, and we see no reason
7 for it being excluded on the
8 basis that it was more
9 prejudicial than probative."
10

11 The significance of this decision goes
12 beyond the passages I have quoted. I also find
13 significance in the fact that the Court of
14 Appeal referred to the ages of the girls in the
15 website images as teenagers but did not attempt
16 to tie that age more closely to the age of the
17 niece, which was 15. In addition, it will be
18 noted that a great number of images were
19 downloaded by Campbell but only six of the
20 images were identified by the court as being
21 very similar to the appearance of the niece.

22 In the instant case, the defendant denies
23 that these sexual acts with JP happened at all.
24 Much of the questioning of the witnesses, in
25 both direct and cross-examination, has been

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1 aimed at exploring the nature of the
2 relationship. The defendant stood in effect in
3 *loco parentis* to JP and was referred to by the
4 latter as "Daddy". They were in each other's
5 presence alone on a great number of occasions
6 and on a regular basis. Although it has not
7 been raised expressly, there is a clear
8 implicit assertion arising from the
9 cross-examination that the relationship between
10 the defendant and JP was an innocent one. The
11 Crown is, of course, alive to that and seeks to
12 rebut that proposition by showing that this
13 defendant had a sexual passion for JP. In aid
14 of that, the Crown wishes to demonstrate,
15 through the use of the internet images, that
16 the defendant had a prurient interest in
17 homosexual acts with or between adolescent
18 boys.

19 Is the evidence relevant? I am satisfied
20 that it is for the reason I have just
21 explained. It is evidence from which a trier
22 of fact could draw an inference that the
23 defendant's interest in JP went beyond an
24 innocent association and was of a sexual
25 nature. That in turn would permit an inference

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1 to be drawn against the defendant that the
2 credibility of JP is supported by the internet
3 images.

4 To what degree does the evidence have
5 probative value? It is not only relevant but
6 has substantial probative value because the
7 inference which might be drawn from it goes to
8 the very heart of the Crown's case. It would
9 appear from what has been said so far in this
10 proceeding that there is little, if any, other
11 evidence in the case which would support or
12 confirm the sworn evidence of JP. It is also
13 noteworthy that the laptop in question was
14 found at the warehouse at a location where JP
15 says some of these sexual acts occurred.

16 The degree of probative value must now be
17 weighed against the potential prejudicial
18 effect of admitting the evidence. All of the
19 authorities from the United Kingdom are in
20 cases where prejudicial effect had to be
21 assessed by asking what use a jury might make
22 of the evidence and what was the danger that
23 the jury might use the evidence improperly to
24 draw an inference which is not permitted. I am
25 conducting a trial sitting without a jury. I

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1 think it fair to note that the danger of a
2 prejudicial effect is less in those
3 circumstances. The point was not fully argued
4 by counsel, and I am content in this ruling to
5 approach the issue as if this were a jury trial
6 and as if the dangers of unfairly prejudicial
7 inferences being drawn are the same.

8 I instruct myself that I must refrain, if
9 the evidence is admitted, from drawing any
10 inference that, because the defendant was in
11 possession of homosexual pornographic material,
12 he is a person of bad character. I remind
13 myself that he has not placed his character in
14 issue. I also instruct myself that I am not
15 permitted to draw any inference, from the fact
16 that he apparently had in his possession
17 pornographic material depicting sexual acts
18 with adolescent boys, that the defendant is a
19 person who has a propensity to commit crime
20 generally or a person who has a propensity to
21 commit indecent acts with young men.

22 I would be permitted at the end of the
23 trial to draw a relatively narrow inference
24 from this evidence, i.e., that this defendant
25 had a marked interest in homosexual acts

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1 engaged in by adolescent males and was, for
2 that reason, more likely to have had a sexual
3 interest in JP extending beyond a mere innocent
4 association.

5 Provided I keep these self-instructions
6 firmly in mind, the prejudicial effect of
7 admitting this evidence is relatively small.
8 Clearly, the probative value of the evidence
9 outweighs its prejudicial effect. I find for
10 these reasons that the evidence is admissible.

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